

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

ROBERT SOLJACK
(Claimant-Appellant)

PRECEDENT
BENEFIT DECISION
No. P-B-22
Case No. 68-1090

S.S.A. No. :

STATLER-HILTON HOTEL
(Employer-Appellant)

Case No. 68-1073

Employer Account No.

DEPARTMENT OF EMPLOYMENT
(Appellant)

Case No. 68-1114

The employer (Case No. 68-1073), the claimant (Case No. 68-1090), and the Department of Employment (Case No. 68-1114) have appealed from Referee's Decision No. LA-13439. The referee concluded that the claimant was unemployed and not ineligible for unemployment benefits because monies received by him in addition to his regular wages constituted tips and gratuities and not wages within the meaning of sections 927 and 1252 of the Unemployment Insurance Code. Written argument was submitted by the parties. These cases have been consolidated for consideration and decision under 22 Cal. Adm. Code 5107.

STATEMENT OF FACTS

The employer herein operates various dining rooms and restaurants in its building and caters banquets. When a patron desires a banquet to be catered, a price per person is arrived at through negotiations between the patron and the hotel. The hotel employs banquet waiters or waitresses through the Hotel and Restaurant Employees Union for the purpose of serving the banquet. These individuals are not regular full-time employees of the hotel. Wages paid to these waiters and waitresses are based upon the contract between the union and the hotel. In addition to the regular wage a

banquet waiter or waitress receives for serving the banquet, he also receives what the employer described as a "tip" or "gratuity."

The amount of this tip or gratuity is based upon the total cost of the banquet. When the employer presents the patron with the bill at the conclusion of the banquet, the employer informs the patron that 10 to 15 percent of the total bill should be added for a "tip" or "gratuity." The employer at this time knows the amount of tip or gratuity.

This amount is then divided by the employer; 15 percent is reserved for the captains and maitre d'hotel and the remaining 85 percent is divided among the waiters and busboys serving the banquet.

The wage the individual waiter or waitress receives for serving the banquet is paid to him immediately upon conclusion of the banquet. The additional money designated as a tip or gratuity is not received at this time. The employer, after ascertaining the amount of the tip or gratuity makes out individual checks in that amount for the waiters and waitresses who serve the banquet and gives the checks to a representative of the union. The waiters and waitresses then obtain these checks from the union. This employer attempts to provide the gratuity or tip checks to the union by the seventh or the twenty-second day of each month.

The claimant herein was employed by the employer as a banquet waiter on October 12, 1967. He served a luncheon for which he received a wage of \$6.53. He served a dinner on the same date for which he received a wage of \$8.31. When he reported to the local office of the Department of Employment to certify for the week of unemployment ended October 14, 1967, he reported the receipt of these wages.

On or about October 23, 1967 the claimant received from his union a check made out by the employer in the total amount of \$21.84 representing tips or gratuities for the two banquets he served on October 12. It appears that, when certifying for benefits for the week ended

October 28, 1967, the claimant reported the receipt of this money. The claimant's weekly benefit amount is \$26.

It is the employer's contention that the money the claimant received in addition to his regular wage represented wages and was allocable to the week in which wages were earned. It is the contention of the claimant and the Department of Employment that the amount of money the claimant received in addition to his wages was wages but allocable to the week in which they were received.

REASONS FOR DECISION

Section 926 of the Unemployment Insurance Code reads:

"926. Except as otherwise provided in this article 'wages' means all remuneration payable for personal services, whether by private agreement or consent or by force of statute, including commissions and bonuses, and the reasonable cash value of all remuneration payable in any medium other than cash."

Section 927 of the Unemployment Insurance Code reads:

"927. If tips or gratuities are customarily received and retained by a worker in the course of his employment from persons other than his employing unit, and if such tips or gratuities, or such tips or gratuities plus the excess of the minimum wage required to be paid by law over and above the amount of such tips or gratuities, constitute substantially the only wage payable to the worker, then the tips or gratuities shall be treated as wages paid by his employing unit. The reasonable amount of tips and gratuities may be estimated pursuant to authorized regulations."

Section 1252 of the Unemployment Insurance Code reads in part:

"1252. An individual is 'unemployed' in any week during which he performs no services and with respect to which no wages are payable to him, or in any week of less than full-time work if the wages payable to him with respect to that week are less than his weekly benefit amount. . . . For the purpose of this section only the term 'wages' includes any and all compensation for personal services whether performed as an employee or as independent contractor."

Section 1279 of the Unemployment Insurance Code reads in part:

"1279. Each individual eligible under this chapter who is unemployed in any week shall be paid with respect to that week an unemployment compensation benefit in an amount equal to his weekly benefit amount less the amount of wages in excess of twelve dollars (\$12) payable to him for services rendered during that week. . . . For the purpose of this section only 'wages' includes any and all compensation for personal services whether performed as an employee or as an independent contractor."

The referee concluded that the amount of money received by the claimant in addition to his wages constituted tips within the meaning of section 927 of the code and, since the amount did not constitute substantially the only wage payable to the claimant, it could not be considered wages within the meaning of either section 927 or section 1252 of the code and therefore it was unnecessary to allocate the amount received to any period. We believe this conclusion to be in error.

In Appeals Board Decision No. P-B-20 we considered a case in which the factual situation was almost identical to that in the instant case. In that case, the claimant when working as a banquet waitress received money from her employer in addition to her wages. The employer designated this amount as a tip or gratuity. In that case, we said that there were certain distinguishing characteristics about a tip or gratuity: A tip

or gratuity is money given an employee by a patron; it is not given to the employee by the employer as part of the wages; the patron decides for himself the amount of the tip or gratuity and decides for himself to whom the tip or gratuity should be given. In the cited case, we concluded that the money received by the claimant in addition to her regular wage for serving a banquet did not constitute a tip or gratuity because the claimant received that amount directly from the employer, the employer determined the amount to be given to the claimant, and determined whether the claimant should receive any amount in addition to her regular wage. We held that the amount the claimant received in addition to her regular wage represented "remuneration payable for personal services" and therefore did constitute wages within the meaning of section 926 of the code.

In the instant case, the money the claimant received in addition to his regular wage was received directly from the employer and the employer established the amount the claimant was to receive and decided that the claimant actually would receive this amount. Therefore, we conclude, as we did in the above cited decision, that the money received by the claimant in addition to his regular wages represented remuneration for personal services and therefore was wages within the meaning of section 926 of the code. Since this amount represented remuneration or "compensation for personal services," it constitutes wages within the meaning of sections 1252 and 1279 of the code.

It is necessary then to decide to what period this amount of additional wages should be allocated. The department and the claimant contend that this amount should be allocated to the week in which it was received, the department basing its contention on Benefit Decision No. 63-570 and Benefit Decisions Nos. 6592 and 6750.

Benefit Decisions Nos. 6592 and 6750 were concerned with the period to which residual payments received by the claimants for reruns of motion pictures in which they appeared should be allocated. The residual payments were mailed by the producer to the union to which the claimants belonged for distribution to the claimants. In Benefit Decision No. 6592, we held that the residual payments received by the claimants should be allocated

to the weeks in which the payment was actually received by the claimant. Benefit Decision No. 63-570 was concerned with allocating the money a banquet waiter received in addition to his regular wages. The referee in the case which we approved by Benefit Decision No. 63-570 applied the reasoning followed in Benefit Decision No. 6592 and held that the amount the claimant received should be allocated to the week in which he received it. Benefit Decision No. 6750 overruled Benefit Decision No. 6592 insofar as the allocation of residual payments was concerned, and, by implication, overruled Benefit Decision No. 63-570.

In Benefit Decision No. 6750, we held that residual payments were allocable to the week in which the payments were mailed by the employer to the claimant's union. In Benefit Decision No. 6750, we allocated the residual payments in the manner in which we did because we concluded that this was the only equitable way to do so. These payments were based upon reruns of motion pictures and it was difficult, if not impossible, to ascertain the week in which such reruns were made and therefore we concluded that the residual payments were allocable to the week in which the payments were mailed to the union.

This is not the situation in the instant matter. The money the claimant received in addition for serving a banquet was received because of the services the claimant performed and he knew when these services were performed. It is true that the claimant did not know the exact amount of the additional wage he was to receive until he obtained his check from his union. However, the claimant could have ascertained the amount he would receive as early as the day following the banquet at which he had served because the facts show that the employer knew when the bill was presented to the patron at the end of the banquet the amount of money to be distributed among the waiters and waitresses.

The cardinal rule in the construction of a statute is to follow the legislative intent and that intent must be determined from the express language of the statute. Where the meaning of the language of the statute is free from ambiguity, the intention of the legislature must be determined from that language, and it cannot be rewritten through interpretation to conform to a presumed intention

which is not expressed, however desirable such a result might appear to be (Seaboard Acc. Corporation v. Shay (1931), 214 Cal. 361, 5 P. 2d 882; Department of Motor Vehicles v. Industrial Accident Commission (1948), 83 Cal. App. 2d 671, 189 P. 2d 730; Benefit Decision No. 6610).

A careful reading of section 1252 of the code convinces us that the purpose of the legislature was to consider an individual unemployed in any week if the wages payable to him with respect to that week were less than his weekly benefit amount. Section 1279 provides for reducing a claimant's weekly benefit amount by the amount of wages (in excess of \$12) payable for services performed during that week.

We interpret these sections to mean that if a claimant has wages payable to him during a week, these wages should be reported when certifying for benefits for that week even though such wages have not actually been received by the claimant. We conclude, therefore, that the wages the claimant received in addition to his regular wage for serving the banquet on October 12, 1967 should have been reported to the department when certifying for benefits for the week in which October 12, 1967 fell. Since the claimant's total wages during the week ended October 14, 1967 were in excess of his weekly benefit amount, he was not unemployed within the meaning of section 1252 of the code.

DECISION

The decision of the referee is modified. The money the claimant received in addition to his regular wages was wages within the meaning of sections 926 and 1252 of the code and, since the wages payable to him for the week ended October 14, 1967 were in excess of his weekly benefit amount, he was not unemployed.

Sacramento, California, August 6, 1968.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

CLAUDE MINARD

LOWELL NELSON

JOHN B. WEISS